Having concluded that the transaction was a moneylending transaction the onus is therefore on the applicant, the party seeking to enforce the contract, to show that the requirements of the Moneylenders Ordinance have been fulfilled. Since the applicant has not replied to the affidavit affirmed by the respondent alleging that there was failure to comply with the provisions of the Moneylenders Ordinance, I would therefore accept as a fact that no memorandum of contract has been delivered to the respondent as required by section 16(1) of the said Ordinance.

For reasons which I have stated, it is therefore my judgment that this application is not enforceable and I would dismiss this application with costs with liberty to the respondent to apply for consequential reliefs.

Application dismissed.

Solicitors: *Yeo & Yeo; Clough Thuraisingham & Co. and Raj & Co.*

G. H. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. (Gill F.J.) August 19. 1972]

[Kuala Lumpur — Originating Motion No. 2 of 1972]

Income Tax — Ex gratia payment — Whether sum of money paid to taxpayer was voluntary and not a gain or profit from an employment — Whether it should be treated as compensation for loss of office or as a gratuity — Income Tax Act, 1967, ss. 4(b), 13(1)(a), (e), Sch. 6, para. 15.

This was an appeal by way of a case stated from an order of the Special Commissioners of Income Tax, confirming the assessment by the respondent to tax, as a gratuity, the sum of $32,000, under section 13(1)(a) of the Income Tax Act, 1967. This sum was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of three month's notice as provided under the contract.

The special commissioners concluded that as the appellant was not a permanent employee of the company, the sum of $32,000 paid to him was not compensation for loss of office but a gratuity in respect of services rendered and as such liable to income tax under section 13(1)(a) of the Income Tax Act, 1967.

The main ground of appeal was that as the appellant had a reasonable expectation of continued employment, the sum of $32,000 was paid to him by way of compensation for loss of employment.

The question of law to be decided was whether, on the facts as found by the special commissioners, the sum of $32,000 should be treated as compensation for loss of office under section 13(1)(e), or as a gratuity under section 13(1)(a) of the Act. An additional question was raised as to whether the said sum was a voluntary payment and therefore not a gain or profit from an employment within the meaning of sections 4(b) and 13(1)(a) of the said Act, and as such, outside the scope of the Act.

Held, dismissing the appeal: (1) the payment to the appellant was made in reference to his services and was something in the nature of a reward for his services. It was in no way related to the period for which he could have gone on working had he been kept in employment until the retiring age. Therefore, the *ex gratia* payment of $32,000 was liable to tax as a gratuity in respect of services rendered under section 13(1)(a) of the Income Tax Act, 1967;

(2) in this case, the evidence showed that the payment was made in reference to, and by virtue of the appellant's employment. Therefore, it was not a voluntary payment so as to make it wholly exempt from income tax by virtue of paragraph 15 of Schedule 6 to the said Act.

Cases referred to:-

(1) *Chibbett* v. *Joseph Robinson & Sons* 9 T.C. 48, 61.

(2) *Comptroller-General of Inland Revenue* v. *T.* [1970] 2 M.L.J. 35, 39.

(3) *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129.

(4) *Holloway* v. *Poplar Corporation* [1940] 1 K.B. 173, 178.

(5) *Beynon (H.M. Inspector of Taxes)* v. *Thorpe* 14 T.C. 1.

(6) *Duncan's Executors* v. *Farmer* 5 T.C. 417, 422.

(7) *Hochstrasser (Inspector of Taxes)* v. *Mayes* [1960] A.C. 376, 387.

(8) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11, 25.

INCOME TAX CASE STATED.

S. Woodhull for the appellant.

Rahmat bin Jamari (Senior Federal Counsel) for the respondent.

Gill F.J.: This is an appeal by way of case stated from an order of the Special Commissioners of Income Tax confirming the assessment by the Comptroller-General of Inland Revenue (the respondent) to income tax, as a gratuity under section 13(1)(a) of the Income Tax Act, 1967, the sum of $32,000 which was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of a three month's notice as provided under the contract to expire at the end of the period of the contract.

The facts as found by the special commissioners, about which there is no dispute, are that the appellant served his employers under five separate contracts of employment commencing on April 24, 1951, February 26, 1956, August 21, 1959, March 27, 1963 and October 26, 1966 respectively. Under each of the contracts the employer had a right to terminate the appellant's employment at any time during the period of the contract by giving him three calendar months' notice or by paying three calendar months' salary in lieu of notice. Although the appellant was in continuous employment up to October 31, 1968 when he was 41 years of age, which meant that the total period of his employment was 17½ years, he was in fact re-engaged at the commencement of each of his contracts of service.

His first contract of service, under a written agreement dated April 24, 1951 between him and the Oriental Estates Agency, London, was for a period of four years at the end of which he was given eight months' leave. His next three contracts were for periods of three years each followed by six months' leave at the end of each period, there being a further written agreement during this period dated March 27, 1962 between him and Sime Darby Holdings Limited. Clause 2 of this latter agreement reads:

"The period of service shall be deemed to have begun and shall continue for a period of three years or such other period as shall be agreed with the Agents from the date of last returning to Malaya for service under the terms of the previously existing Agreement with Oriental Estates Agency Limited, London, and thereafter (unless the same shall have

been previously determined as hereinafter provided by either party) shall be deemed to be an engagement from year to year determinable at any time by three months' notice on either side and subject to the terms and conditions herein contained."

His fifth and final contract of service, which was for two years followed by three months' leave, was due to expire on October 26, 1968.

On July 31, 1968 the appellant received a letter from Sime Darby Malaysia Berhad which stated, *inter alia*, as follows:—

"It is with regret that we find it necessary as part of the reorganisation of estates to give you three months' notice of the termination of your employment which notice commences on 1st August. You are due for three months' leave on the 26th October when you will have completed a two year tour. If you wish you may proceed on that date or before if it is convenient, or you may serve your notice to the 31st October. In the event that you leave before 31st October you will of course be paid salary, overseas allowance and children's allowance up to and including 31st October. Transport allowance and manager's allowance will cease on the date you leave the estate.

....

As compensation for loss of employment you have been accorded a sum of $32,000 *ex gratia*.

The tax complications relating to this *ex gratia* payment were explained to you this morning. Because of these we will not be able to pay the full amount of compensation immediately but subject to tax clearance in respect of your remuneration for 1968, we hope that it will be possible to pay you up to 50% of the compensation before you depart."

As stated by the special commissioners, the appellant was not re-engaged due to the reorganisation of the company's estates whereby their Gedong Estate and Soon Lee Estate were put under the jurisdiction of one manager. Under a scheme of "Proposed Compensation in cases of Possible Amalgamation" which the company had drawn up voluntarily by way of "Rationalisation of Estate Management", he was paid a 100% compensation of $32,000 by reason of his age and years of service.

On those facts of the case, what was contended before the special commissioners on behalf of the appellant was this. The agreement dated April 24, 1951 was the only contractual document between the appellant and his employer company, the other documents being merely extensions of the said agreement to define the periods of employment and periods of leave. As the appellant was under a continuous contract of service with the company, he was a permanent employee of the company. The sum of $32,000 paid to him was not a gratuity for services rendered but compensation for loss of office which came within the provisions of section 13(1)(e) of the Income Tax Act, 1967, so that it was wholly exempt from income tax by virtue of paragraph 15 of Schedule 6 to the said Act. In the alternative, the said sum of $32,000 was a voluntary payment not paid to the appellant by virtue of his employment, so that it was not a gain or profit from employment under sections 4(b) and 13(1)(a) of the Income Tax Act, 1967.

The contentions on behalf of the respondent were that the appellant was employed under five separate contracts for fixed periods, that his final contract of service was terminated by three months' notice in writing dated July 31, 1968 in accordance with the terms of the contract, and that the sum of $32,000 paid *ex gratia* to him was not compensation for loss of office but a gratuity for services rendered, so that it was a gain or profit from the appellant's employment and therefore assessable to income tax under the provisions of section 4(b) and section 13(1)(a) of the Income Tax Act, 1967.

In the event, the special commissioners accepted the contentions of the respondent and reached the conclusion that as the appellant was not a permanent employee of the company the sum of $32,000 paid to him was not compensation for loss of office but a gratuity in respect of services rendered and as such liable to income tax under section 13(1)(a) of the Income Tax Act, 1967.

It seems clear from what I have said so far that the question of law for the opinion of this court on the case stated is whether on the facts as found by the special commissioners the sum of $32,000 paid to the appellant should be treated as compensation for loss of office under section 13(1)(e) or as gratuity under section 13(1)(a) of the Income Tax Act, 1967. There is also the added question as to whether the said sum of $32,000 was a voluntary payment and therefore not a gain or profit from an employment within the meaning of sections 4(b) and 13(1)(a) of the said Act and as such outside the scope of the Act.

The reasons which the special commissioners have set out in their grounds of decision for their conclusion may be summarised as follows. The appellant was engaged in the first instance on contract for a term of 4 years. Subsequently he was re-engaged also on contract for three terms consisting of three years each. His final contract of service was for a term of 2 years expiring on October 26, 1968. Prior to the expiry of each contract, the company offered and the appellant accepted the offer of a fresh term of engagement for a term of years. In every instance he was re-engaged after the expiry of his leave under the previous contract, and his contract of service was determinable by 3 months' notice. The company, in accordance with the terms of the final contract of service, gave the appellant the prescribed notice of termination by letter dated July 31, 1968, so that it was patently obvious that the company exercised their rights under the terms of the contract of service. There being no agreement for the payment of any compensation or gratuity to the appellant on the determination of his contract of service, the sum of $32,000 was paid *ex gratia* under a scheme drawn up by the company *ex parte*. The scheme was based, *inter alia*, on the age of the employee and his years of service. It was therefore obvious that the said payment was a "gain or profit from employment" in the nature of a gratuity, and not compensation for loss of employment. There was no evidence of "redundancy" in the true sense of the word, the company's so-called "reorganisation" or "amalgamation" being merely a means of cutting down on expenses, presumably due to the depressed price of rubber, by having one manager in charge of two estates. In a genuine redundancy the principle of "last in, first out", other things being equal, is generally valid, and yet the appellant was picked out for retrenchment notwithstanding the fact that there were

no adverse reports against him. In the circumstances, it could not be said by any stretch of imagination that the appellant had a clear expectation of continued employment in the company until the retiring age of 55, when there was a fresh offer and acceptance of employment from one contract of service to the next.

The special commissioners go on to state in their grounds that it was not true to say that the appellant's employment was terminated because of reorganisation, the true position being that the appellant was not re-engaged after the expiry of the current contract of service due to the reorganisation of the company's estates. It is said that this finding of the special commissioners being in apparent contradiction of their finding of fact that the appellant was not re-engaged due to the reorganisation of the company's estates, the semantic refinement suggested is well beyond the ken and comprehension of the ordinarily informed. I do not think so. The subtle distinction may be said not to have been happily worded, but what the special commissioners were saying was that the appellant's employers could not offer him another contract, which they were certainly not obliged to do, because of the reorganisation of their estates. In my judgment nothing turns on this so-called contradiction.

The special commissioners have stated further that the appellant had no entitlement to employment after October 25, 1968, and that at most he merely had a prospect of his contract of employment being renewed. And they point out that the Act provides for exemption from income tax of "compensation for loss of employment", and not of compensation for loss of prospect of renewal of a contract of employment. These observations of the special commissioners are criticised on the ground that they contain a casuistry that must be beyond the grasp of the most tutored Jesuit. A short answer to this criticism is that the implication of what the special commissioners were saying is clear, namely, that this was not a case of deprivation of continuous employment under a contract of master and servant for a general hiring, a distinction which was brought out in what the special commissioners went on to say in the next paragraph of their grounds, to which I shall refer later.

The main ground of appeal is that as the appellant had a reasonable expectation of continued employment or, in the words of Rowlatt J. in *Chibbett* v. *Joseph Robinson and Sons*,[1] his employment was likely to continue, the sum of $32,000 was paid to him by way of compensation for loss of employment. Reference is also made to what I said in the Federal Court in *Comptroller-General of Inland Revenue* v. *T*.[2] The arguments in support of this ground are that the appellant had served for a continuous period of 17½ years, that his contracts spoke of "tours of duty", that by clause 14 of the first written contract the appellant was required to be a member of the provident fund the rules of which applied only to permanent employees, that clauses 5 and 8 of the second written agreement refer to the "standard terms for Planters in force from time to time" which provided for normal retirement at the age of 55, and that the letter dated March 31, 1967 ("Exhibit A") written by the company to the appellant on the subject of Malayanisation confirms that "all expatriates will normally retire on reaching the age of 55". Reliance is also placed on the words "completion of each subsequent three years" in clause 8 of the second written agreement, notwithstanding the fact that those words are qualified by the words "should the Planter continue in the service of the Principal".

In my judgment, the fact that certain rules of the company which were applicable to permanent employees were also made applicable to the appellant cannot alter the fact that each of his "tours of duty" was on a contract of service for a definite time. His having been re-engaged on a fresh contract on the expiry of each of his previous contracts over a period of 17½ years did not make him a permanent employee as in the case of a general hiring for an indefinite time. It was on the basis of the distinction between a contract for a fixed period and a contract of general hiring that the special commissioners made their deciding orders, as would seem clear from the following passage in their grounds of decision:—

> "The words 'loss of an employment which need not continue, but which was likely to continue' must be interpreted in the light of the facts in *Chibbett's* case which were that the contract of employment provided for continuous employment, the period of which was not fixed. The Federal Court in *Knight's* case approved of Rowlatt J.'s *dictum*, and in *Knight's* case the contract of employment also provided for continuous employment. Therefore the *dictum* does not apply to a case where the contract of employment fixed the period of employment and the payment was made where the employment ceased according to the period fixed in the contract of employment."

I am of the opinion that they were right in thus distinguishing this case from *Knight's* case. It is true that the contract of service in *Knight's* case was also liable to be terminated at any time by the employers giving three months' notice, but it was none the less a contract of general hiring for an indefinite time so as to be a contract of "continuous employment" as the special commissioners have described it, in my opinion quite rightly. And it is, no doubt, true that a general hiring without more is terminable on reasonable notice (see *McClelland* v. *Northern Ireland General Health Services Board*[3]). Therein lies the difference between this case and *Knight's* case. The other difference is that in *Knight's* case the money was paid under a fresh agreement abrogating the contract of service, whereas in the present case it was money gratuitously granted or paid, whether in one sum or in instalments, which is what a gratuity means (see *Holloway* v. *Poplar Corporation*.[4] I must therefore reject the argument that the amount paid to the appellant in this case is not chargeable under any section of the 1967 Act other than section 13(1)(e) as compensation for loss of employment.

A ground of appeal in the alternative is that, as the appellant had no entitlement under any of his contracts of service from time to time to the sum of $32,000 which was paid to him, it was a payment not made in respect of his employment but a voluntary payment. In other words, it is suggested that it was a gift of a personal nature as in the case of *Beynon (H.M. Inspector of Taxes)* v. *Thorpe*.[5] I do not think I can accept that suggestion in the light of the clearest possible evidence that the payment in this case was

made in reference to and by virtue of the appellant's employment. It is also said that the words "in respect of having or exercising the employment" in section 13(1)(a) of the Income Tax Act, 1967 require the payment to be of a contractual nature, a payment to which the taxpayer is legally entitled. But I can find no justification for placing any such construction on these words. It is next pointed out that these words do not have the same meaning as the words "in respect of employment" in section 10(2)(a) of the Income Tax Ordinance, 1947. To my mind there is no difference between a "gratuity in respect of employment" and a "gratuity in respect of having or exercising the employment". The latter phrase, if anything, has a much wider meaning.

It is conceded that there are numerous authorities for the proposition that a voluntary payment to the holder of an office made by virtue of his office or employment is taxable notwithstanding that there may not be any legal obligation to make the payment, but it is argued on the authority of *Duncan's Executors* v. *Farmer*[6] that a payment made when the recipient is no longer in office or employment is not a profit of office or employment. I do not see the cogency of that argument in relation to an *ex gratia* payment made on the termination of a person's employment, as it would be a payment in respect of having or exercising the employment, especially when the payment is related to the total period of his employment.

In the leading case of *Hochstrasser* v. *Mayes*,[7] Viscount Simonds said:

"Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. 'In my judgment,' he said, 'the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.' In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate."

It would seem clear that in the present case the payment to the appellant was made in reference to his services and that it was something in the nature of a reward for his services.

It is common ground that what has to be ascertained is the true character of the payment of $32,000 in the light of the facts leading up to such payment. In the words of Viscount Simon in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*,[8] the question always is what is the real character of the payment, not what the parties call it. I need hardly add that although the employers chose to call their scheme under which the appellant was paid the sum of $32,000 a scheme of compensation, it was in reality a scheme for the payment of a gratuity to its staff on the basis of age and years of service. What the appellant had was an *ex gratia* payment of $32,000 for the services rendered. It was in no way related to the period for which he could have gone on working had he been kept in employment until the retiring age of 55. It is therefore liable to tax as gratuity in respect of having or exercising the employment, under section 13(1)(a) of the Income Tax Act, 1967. That being so, the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

R.T. LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Gill F.J.) August 19, 1972]

[Penang — Originating Motion No. 2 of 1972]

Income Tax — Assessment — Sale of business by taxpayer to wholly owned subsidiary company under a 'reconstruction agreement' — Basis for computing statutory income — 'Acquisition' of source — Applicability of provisions consequent upon acquisition of source — Income Tax Ordinance, 1947, s. 31(1) and (5) — Income Tax Act, 1967, as amended by Income Tax (Transitional Provisions) Order, 1968, Sch. 9, para. 104(a) and 105(a).

This was a case stated by the Special Commissioners of Income Tax arising out of an appeal to them against the assessment of income tax by the respondent on the appellants' income for the years 1966 and 1967.

By an agreement dated November 11, 1966 the appellants' company, incorporated in Hong Kong with its registered office there, agreed to sell to the R.T. Plantations Sdn. Bhd., incorporated in Malaysia as a wholly owned subsidiary company of the appellants, the whole of the appellants' business as a going concern on the terms and conditions as set out in a "reconstruction agreement". The appellants owned five rubber estates and the income from these estates constituted the business income which the appellant had in Malaysia and which the Income Tax Department had been treating as one source. Clause I of the agreement was to the effect that "relevant completion date" of the sale of each of the five estates was to extend over a period from October 1st, 1966 to September 30th 1967.

The question for determination by the Special Commissioners was whether the provisions of paragraph 104(a) of Schedule 9 to the Income Tax Act, 1967 as amended by the Income Tax (Transitional Provisions) Order 1968, applied to the appellants. The special commissioners concluded that there was an "acquisition" within the meaning of paragraph 105(a) of Schedule 9; that there was acquisition of five sources as at the different completion dates of sale of the five rubber estates; and that the provisions of paragraph 104(a) of Schedule 9 applied to the three rubber estates acquired after 15th June, 1967, but not to the two rubber estates acquired prior to 15th June, 1967.

The special commissioners accordingly made an order directing that the notices of assessments in respect of the appellants' income for the years of assessments 1966 and 1967 be amended in that the income tax in respect of the two estates sold before June 15th, 1967 be assessed under section 31(5) and in respect of the three estates sold after June 15, 1967, under section 31(1) of the West Malaysian Ordinance (Income Tax Ordinance 1947).

The appellants' appealed from this order.

Held, dismissing the appeal: (1) there was evidence to support the decision of the special commissioners;

(2) an agreement to sell and the completion of the sale are two different things. The acquisition of the source can only date from the date of completion of the sale.